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Phillips v. Gomez Appellant's Brief Dckt. 44594

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**TODD J. PHILLIPS, in his capacity as
TRUSTEE OF TRUST "A" OF THE
ELLIOTT FAMILY TESTAMENTARY
TRUST**

Plaintiff/Appellant.

vs.

RICHARD D. GOMEZ

Defendant/Respondent.

Supreme Court No. 44594

District Court No. CV-OC-2013-20057

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Deborah A. Bail, Presiding

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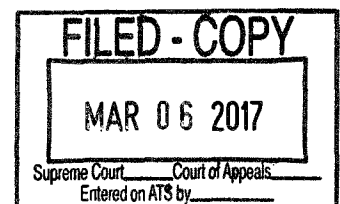


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1.

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises from a buyer's breach of a real estate contract for the sale/purchase of residential real estate located in Eagle, Idaho. The sole question raised by the case is whether a seller who has accepted non-refundable earnest money from a buyer pursuant to an agreement memorialized in a standard form RE-21 REAL ESTATE PURCHASE AND SALE AGREEMENT and several subsequent RE-11 ADDENDA still has the option of pursuing other remedies to collect its actual damages after it has accepted non-refundable earnest money.

Paragraph 28 of the RE-21 signed by the parties in this case included the following language: "DEFAULT: If BUYER defaults in the performance of this Agreement, SELLER shall have the option of: (1) accepting the earnest money as liquidated damages or (2) or pursuing any other lawful remedy to which SELLER may be entitled." None of the remaining language in that Paragraph (Ex. 2A, p. 5) contemplates or addresses a situation where earnest money is made non-refundable and paid to the seller without conditions before the designated closing date. Rather, the remaining language in Paragraph 28 addresses situations where earnest money is deposited with a real estate broker and is still being held by the broker at the time of the buyer's default.

In its Findings of Fact and Conclusions of Law, the trial court found, and held, that by accepting the non-refundable earnest money the seller had effectively "pre-elected" the remedy of acceptance of liquidated damages and was barred from recovering its actual, substantially greater, damages (R. p. 150-151). It is the plaintiff's position that the clear language of paragraph 28,

gave it the option of either accepting the non-refundable earnest money it had received as liquidated damages or, giving the buyer full credit for the non-refundable earnest money, instituting an action to recover its actual damages.

B. Course of the Proceedings.

Plaintiff filed its complaint to recover damages caused by defendant's breach of contract in District Court in Ada County on November 6, 2013. Plaintiff filed an amended complaint on July 28, 2014 and defendant filed his Answer on September 9, 2014. Both parties demanded trial by jury. The case was eventually tried without a jury, by stipulation of the parties, on September 1, 2015. The Court entered its Findings of Fact and Conclusions of Law on September 15, 2015 (R. Vol. 1, p. 142-153) and its judgment on September 24, 2015. Plaintiff filed its Notice of Appeal on October 30, 2015 and the case was assigned Docket #43678. After the matter was briefed and scheduled for oral argument, this Court concluded that the judgment entered on September 24, 2015 was not an appealable final judgment and entered an ORDER CONDITIONALLY DISMISSING APPEAL on August 16, 2016 (R. Vol. 1, p.179). Appellant filed a motion with the District Court requesting entry of a judgment amended accordingly. The District Court did not "re-enter" its amended final judgment until August 31, 2016 (R. Vol. 1, p.171) and the original appeal was dismissed without prejudice on October 6, 2016 (R. Vol. 1, p.179). Appellant filed its second Notice of Appeal on October 7, 2016 and, pursuant to this Court's November 9, 2016 Order Augmenting Prior Appeal (R. Vol. 1, p.167), this matter is before the Court again.

C. Statement of Facts

Plaintiff, Todd J. Phillips, is the duly appointed Personal Representative of the Estate of

Edward G. Elliott and Trustee of a Trust "A" of the Elliott Family Trust, for which he has acted in this matter. On the death of Mr. Elliott on March 5, 2008, ownership of the real property (located at 1372 W. Wickshire Ct, Eagle, Idaho) which is at the heart of this case passed from Mr. Elliott to Trust "A" of the Elliott Family Testamentary Trust. That transfer was accomplished on or about the 10th day of April, 2008 (Tr. Pp. 82-83). Phillips, in his capacity as Personal Representative of the estate of Edward G. Elliott and Trustee of the Elliott Family Trusts, needed to liquidate the assets of the said Trust in order to distribute Mr. Elliott's estate to his heirs as he had directed by his last will and testament and listed the said property for sale with an Ada County Realtor in September of 2008 for the price of \$915,000.00 (Tr. p. 84-85). The defendant, Richard Gomez, contacted the plaintiff in October of 2008 through the Trust's Realtor and began negotiating for the purchase of the property. Those negotiations resulted in an October 28, 2008 agreement between Phillips and Gomez for Gomez to purchase the subject property for \$660,000.00, with the sale to close on December 15, 2009. (Tr. p. 85-87). As consideration for the agreement, Gomez agreed to make a \$66,000.00 down payment as "earnest money", which sum would become non-refundable and be paid to the Trust on satisfaction of an inspection contingency. Gomez waived the inspection contingency and the down payment was released to the Trust in November of 2008 (Tr. p. 22-23). The purchase agreement, which was made on a standard, pre-printed Idaho real estate form RE-21 (Ex.2A) and several RE-11 forms (with various addenda and supplemental agreements, also entered into evidence at the trial of this matter), provided that the closing on the purchase and sale would not take place until December 15, 2009 and that the defendant would lease the premises in the interim. (Ex. 2B, 2F). A lease agreement (Ex.2G) was executed by the parties and Gomez immediately occupied the premises

as a tenant, with Phillips expecting the transaction to close on December 15, 2009 (Tr. p. 86). Around December 1, 2009, Gomez advised Phillips through their Realtor that he would not be able to get a loan and began trying to negotiate a new agreement. (See Tr. p 86-87). Those negotiations resulted in an amendment to the agreement, dated December 2, 2009, by which Phillips agreed to carry a \$100,000.00 note from Gomez, with closing still set for December 15, 2009 Ex. 2I and Tr. p 87-89). On December 14, 2009, Gomez advised the Realtor, who in turn advised Phillips, that he would not close on the property on December 15, 2009 as previously agreed (Tr. p. 102-104).

After defaulting on the contract, Gomez asked of Phillips that he be allowed to continue to live in the subject residence as a "month to month" tenant until Phillips should be able to sell the property. Phillips agreed. (Tr. p. 122-123 and Ex. 2G) and Gomez continued to live in the residence until May 31, 2010.

After Gomez defaulted on his agreement to close on December 15, 2009, Phillips had the property re-appraised and listed for sale with a different Realtor (Tr. p. 96-98. Ex. 5). The property sold to a third party in June of 2009 for \$527,500.00, with a net to seller of \$503,620.50 (Tr. p. 97-98. Ex. 10-11).

2.

ISSUES PRESENTED ON APPEAL

- A. Did the district court err when it found Phillips' acceptance of non-refundable earnest money from Gomez constituted an election of remedies which precluded him from pursuing a claim against Gomez for the damages the Trust actually suffered because of Gomez's breach?
- B. Plaintiff requests an award of attorney fees and costs incurred in this appeal, pursuant to I.C. § 12-120(3), 12-121 and I.A.R. 35(b)(5), I.A.R. 40 and I.A.R. 41(a).

3.

STANDARD AND SCOPE OF REVIEW

“When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. An unambiguous contract will be given its plain meaning. The purpose of interpreting a contract is determine the intent of the contracting parties at the time the contract was entered. In determining the intent of the parties this Court must view the contract as a whole.” *Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185-86, 75 P.3d 743, 746-47 (2003). *Bakker v. Thunderspring-Wareham, LLC*, 141 Idaho 185, 188-89, 108 P. 3d 332, 337 (2005).

When reviewing a trial court’s decision following a bench trial this Court’s review is limited to determining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. This Court will exercise free review of a trial court’s conclusions of law to determine whether the court correctly understood and stated applicable law and whether the trial court’s legal conclusions are sustained by the facts found. *Clayson v. Zebe*, 153 Idaho 228, 232, 280 P.3d 731, 735 (2012) (quoting *Fox v. Mountain W. Elec., Inc.*, 137 Idaho 703, 706-07, 52 P.3d 848, 851-52 (2002)).

4.

ARGUMENTS AND AUTHORITY

The plaintiff has been unable to find any case, in Idaho or elsewhere, involving a real estate transaction where a seller sued a buyer who had made a payment of non-refundable earnest money before defaulting on the underlying contract, thereby causing the seller to sustain damages substantially in excess of the earnest money it had received prior to the time buyer defaulted on the contract. However, plaintiff believes the language in paragraph 28 of the RE-21 (Ex.2A) executed by the parties specifically allowed it to pursue a claim for its actual additional damages over and above the amount of the earnest money it received prior to buyer’s breach of the agreement and failure to close on the transaction.

As noted above, the RE-21 REAL ESTATE PURCHASE AND SALE AGREEMENT signed by the parties in this case included the following language: "DEFAULT: If BUYER defaults in the performance of this Agreement, SELLER shall have the option of: (1) accepting the earnest money as liquidated damages or (2) or pursuing any other lawful remedy to which SELLER may be entitled". (Ex. 2A, p. 5). The remaining language in that paragraph discusses only the procedure to be followed in cases where the earnest money paid by a seller is held in a trust account by a real estate broker and the seller elects to accept that earnest money as its liquidated damages and makes a demand for its release. There is no language there, or anywhere else in the RE-21 agreement, or in the RE-11 addenda executed by the parties, addressing a situation, like this one, where earnest money is released by a buyer and dispersed to a seller long before a contemplated closing (13 months before, in this case). Nor is there any language anywhere in the agreement between the parties suggesting the seller here had conceded or given up its right to make an election to accept earnest money as liquidated damages, seek specific performance or seek to recover its actual damages. In fact, here Phillips had made it clear from the time Gomez defaulted that he did not intend to accept the earnest money he had received as liquidated damages and did intend to pursue either the remedy of specific performance or the recovery of his actual damages. (See paragraph 4 of plaintiff's Exhibit No. 4), a "Memorandum of Understanding Re: Terms of Month to Month Lease", signed by Gomez and Phillips on January 29, 2010, after Gomez defaulted, which reads, in part:

"Lessor entered into an agreement to purchase the above referenced premises and was unable to close that sale, as contemplated by both the original lease and the Purchase and Sale Agreement between the parties and Lessee understands and acknowledges that he has no further rights regarding the purchase of these premises, pursuant to the said lease, Purchase and Sale Agreement or otherwise, and that Lessor, or Todd J. Phillips, acting as Trustee for Lessor, may bring an action for specific performance and/or damages which have resulted or may result, from Lessee's failure to have purchased the said premises on the terms he previously agreed to."

By this language, included in the memorandum of understanding he signed on January 29, 2010 (Tr. p. 61-62), so he could continue to occupy the subject residence, Gomez was put on notice Phillips did not necessarily intend to accept the earnest money he had received as liquidated damages. That notice was soon followed by a letter from Phillips' counsel demanding that Gomez close on the property and advising him that if he did not do so, Phillips would proceed to sell the house and look to Gomez for any damages the Trust might sustain (Ex, 4, p. 2, paragraph 3, Tr. p. 61-62). There is nothing in the record that would indicate Phillips ever thought about accepting, much less elected or agreed to accept, the non-refundable earnest money the Trust had received from Gomez as liquidated damages in lieu of its actual damages.

Gomez did not close on the property and Phillips had the property re-appraised and listed for sale with a different Realtor. (Tr. p. 96-98. Ex. 5). The property sold to a third party in June of 2009 for \$527,500.00, with a net to seller of \$503,620.50. (Tr. p. 97-98. Ex. 10-11). Phillips, who is a licensed Certified Public Accountant, calculated that as a result of the defendant's breach, the Trust on whose behalf he has acted in this matter incurred actual damages of approximately \$60,000.00 (Tr. p. 110-121. Ex. 15), over and above the earnest money it had received and filed his complaint in this matter to recover those damages.

Although the case is not directly on point, this Court has previously addressed the issue of the election of remedies set forth in paragraph 28 of an earlier, but very similar version of the RE-21 "Real Estate Purchase and Sale Agreement" used here. In *The Margaret H. Wayne Trust v. Allan G. Lipsky* 123 Idaho 253, 257-58, 846 P.2d 906, 908-09 (1993), this Court held that the presence of a liquidated damage clause in an earnest money agreement does not preclude the non-defaulting party from recovering its actual damages suffered when the other party breaches an agreement to purchase real estate and, after a lengthy discussion of the reasons why a seller

should have the option of pursuing a claim for its actual damages even when it had the option of accepting earnest money as liquidated damages, concluded that while it might be possible to clearly draft an agreement that would limit a seller's remedy to retaining an earnest money deposit as liquidated damages, the language in the standard form real estate contract used in that case, which is very much like the language in the RE-21 utilized by the parties in this case, did not prevent the seller from recovering its actual damages. The plaintiff submits that even though there was no non-refundable earnest money in that case, the same reasoning should apply here.

The conclusion this Court reached in the *Wayne* case has been cited with approval in several other jurisdictions and has met with particular approval in Washington and Colorado. In *Noble v. Ogborn*, 43 Wn. App. 387, 390-91 (Wash. App. Div. 1, 1986), 717 P.2d 285, 288-89 (1986), the Washington Court of Appeals cited *Wayne* as authority for the proposition that either/or language of the kind found in the REAL ESTATE PURCHASE AND SALE AGREEMENT signed by the parties in this case would allow a seller to elect to sue for actual damages rather than accepting earnest money as liquidated damages. It should be noted that this case did not involve non-refundable earnest money.

In a relatively recent recent case, the Colorado Court of Appeals, Division V, has cited the *Wayne* case as authority for its conclusion that a liquidated damages provision in a real estate contract does not prevent a party from pursuing alternative remedies. See *Ravenstar LLC v. One Ski Hill Place LLC*, 012816 COCA, 14 CA 2401 (29-36) (2016). Neither this case, nor any of the authority it cites involved a case in which non-refundable earnest money was paid by a buyer.

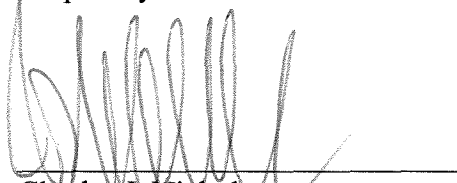
4.

CONCLUSION

Phillips believes the plain language of Paragraph 28 of the RE-21 REAL ESTATE PURCHASE AND SALE AGREEMENT (Ex. 2A. p. 5) makes it clear he had the option of either retaining the defendant's non-refundable earnest money as liquidated damages or (emphasis added) pursuing any other lawful right or remedy to which seller/plaintiff might have been entitled, including either specific performance or recovery of its actual damages. In this case, Phillips elected to proceed with an action to recover the Trust's actual damages of approximately \$60,000.00 over and above the amount of the earnest money Gomez released to Phillips. In calculating those damages, Phillips gave Gomez full credit for his earnest money and asked the trial court to award the Trust an additional sum of approximately \$60,000.00 as and for its actual damages (Tr. p. 110-121. Ex. 15).

Phillips believes that as a matter of law, the trial judge incorrectly construed the language of paragraph 28 of the RE-21 in ruling that Phillips had "preselected" the Trust's remedy and had waived or forfeited its right to recover its actual damages by accepting non-refundable earnest money from Gomez and therefor asks this Court to reverse the decision of the district court, hold Phillips can recover the Trust's actual damages and remand the case to the trial court for determination of the exact amount of the damages Phillips may recover from Gomez.

DATED this 4th day of March. 2017.

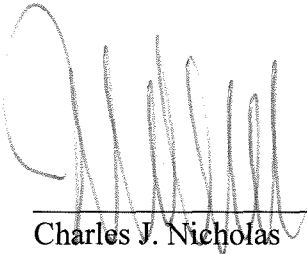

Charles J. Nicholas
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March, 2017, I caused true and correct copies (2) of the foregoing APPELLANT'S BRIEF to be served upon the following by depositing the same in the U.S. mail, first class postage prepaid:

STEVEN FISHER
Fisher Law Offices, PLLC
1859 S. Topaz Way, Ste. 200
Meridian, Idaho 83642

DATED this 6^h day of March, 2017.



Charles J. Nicholas